Judgment and Decree of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of June one thousand nine hundred and sixty.

Present:

HON. CHARLES E. CLARK,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges.

JOHN MONTEIRO,

Libellant-Appellant,

v.

SOCIEDAD MARITIMA SAN NICOLAS, S.A. and the SS EUBYAMABIS, her Engines, etc.,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with instructions to grant leave to file the amended libel save for the first cause of action, in accordance with the opinion of this court, with costs to the appellant.

A. Daniel Fusaro
Clerk

Opinion of Court of Appeals Reversing District Court Decree

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 312 October Term, 1950.

Argued May 10, 1950. Decided June 29, 1950.

Docket No. 22558

JOHN MONTERO,

Libelant-Appellant,

v.

SOCIEDAD MARITIMA SAN NICOLAS, S.A. and the SS "EUBYADES," her engines, boilers, tackle, appurtenances, etc.,

Respondents-Appellees.

Before:

CLARK, Moore and Frank,

Circuit Judges.

Libelant appeals from an order of the District Court for the Southern District of New York, Thomas F. Murphy, *Judge*, 175 F. Supp. 1, sustaining respondent's exceptions to the libel, dismissing libelant's cause of action for injury sustained aboard the vessel

Appeal

Opinion of Court on Libelant's Re-
Petition for Leave to

without leave, plead anew. Denial of leave to amend reversed.

Isaac Sutton (Lebowich & Sutton on the brief), New York, N. Y., *for Libelant-Appellant.*

Dennis E. Mooney (Cardillo & Stuth on the brief), New York, N. Y., *for Respondent-Appellee.*

Friendly, *Circuit Judge:*

Libelant is a Portuguese seaman. Respondent, a Panamanian corporation, owns the SS Euryviades, a freighter flying the Liberian flag. Libelant shipped on her at Baltimore in April, 1952 as a fireman; he continued to be employed on the Euryviades until September, 1956. He was then discharged at Galveston and, respondent claims, signed a paper acknowledging that he had "received all money and wages due me from this vessel" and that "my sole reason for leaving the ship is to visit relatives in this country." Monteiro does not deny the receipt of all regular monthly wages. By this libel, brought in October, 1956, in the Southern District of New York, he seeks to recover additional sums claimed to have been due at the time of his discharge. The case was previously before us, 251 F. 2d 511 (2 Cir. 1958), on an appeal from an order quashing the service of process. We held that a hearing was necessary to determine certain issues of fact, and reversed and remanded to that end. Thereafter respondent appeared generally.

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The libel asserted two causes of action, one for $4,130.11 of vacation and overtime pay alleged to be owing under the Panamanian Labor Code, and the other for $3,024.00 of penalty wages claimed to be due under 46 U. S. C. § 596. Respondent's exceptions challenged the applicability of Panamanian law. Correctly anticipating, on the basis of Judge Ricks' opinion in *Evangelinos* v. *Andriaropoi C.I.A. N.V.*, S.A., 162 F. Supp. 520 (S. D. N. Y. 1958), our decision, *Lauritzen* v. *Larsen Compañia Acandalia, S.A.*, 276 F. 2d 822 (2d Cir. 1960), that Panamanian law was inapplicable under circumstances such as here alleged, libelant cross-moved for leave to amend. The proposed amended libel asserted three causes of action. The first replcaded the claim for vacation and overtime pay under Panamanian law, with variations from the original theme which we deem immaterial. The second set forth a claim for overtime pay of $3,510.54 under § 51 of the Labor Law of Liberia which we quote in the margin.[1] The third cause of action asserted a claim for penalty wages under 46 U. S. C. § 596. The district judge entered an order sustaining the exceptions to the libel, denying the cross-motion for leave to amend and dismissing the libel without leave to plead over, 175 F. Supp. 1. From this order libelant appeals.

[1] "§ 51. Overtime defined; time and one-half required. Except as otherwise provided in this chapter, no employer shall employ any workman for a workweek longer than forty-eight hours unless such workman receives payment for each hour worked in excess of forty-eight at the rate of one and one-half times the hourly rate at which he is employed."

Opinion of Court of Appeals Reversing District Court Below

For reasons stated in *Gomez v. Alianca Companhia Nacional*, *supra*, the district court was right in dismissing the original libel and in denying leave to plead the first cause of action in the proposed amended libel. However, unlike *Gomez*, where libelant had neither pleaded nor proved the Liberian law, 256 F. 2d at 826, here the second cause of action in the proposed amended libel adopted a provision of Liberian law on its face permitting libelant to overtime pay which he claims not to have received. Our ruling as to dismissal will relate solely to this second cause of action and the related claim for penalty wages under 46 U. S. C. § 596.

The district court based the denial of leave to amend in part upon the ground, 175 F. Supp. 3, that "a seaman's claim for compensation which is denied solely from a foreign statute applying to workmen generally is not an 'admiralty or maritime' claim," so that the court was without jurisdiction under 28 U. S. C. § 1333, and no other basis of federal jurisdiction exists. The court was mistaken in ruling that the claim was not maritime. The critical consideration is the claim's relationship to the sea; see *The Pocono*, 276 Fed. 918, 443 (S. D. N. Y. 1921), not whether it arises under unwritten or subject only to the principle of *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917) written law. We have previously sustained seamen's wage claims based solely on foreign statutes, see, e.g., *Bonanza S. S. Atlantic Maritime Co.*, 229 F. 2d 172, 174 (C. A. 2d Cir. 1956); *Pedersen v. Compagnie Des Chargeurs*, 250 F. 2d 582, 584 (C. A. 2d Cir. 1958), affirming 150 F. Supp. 775, 779 (S. D. N. Y. 1957). It is

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justify the court in declining jurisdiction. However, the hypothesis is an unreal one; for here, in contrast to personal injury claims, there are relevant statutes, and we must determine the issue in the light of them.

The statutes are 46 U. S. C. 596 and 597. Section 596 requires the master or owner of any vessel to pay a seaman on vessels making foreign voyages his wages within twenty-four hours after the cargo has been discharged or four days after the seaman has been discharged, whichever first happens. It further provides that every master or owner who refuses or neglects to make such payment "without sufficient cause" shall pay the seaman a sum equal to two days' pay for each day during which payment is delayed, "which sum shall be recoverable as wages in any claim made before the court." Section 597 provides that "Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or discharge cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void . . ." And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be due at the time as provided in section 596 of this title." The critical clause is a proviso "That this section shall apply to seamen on foreign vessels while in the ports of the United States and the courts of the United States shall be open for their application."

Opinions of Court of Appeals Reversing District Court Decrees

Section 597 represents an amendment of Revised Statutes 4530 by § 4 of the Seamen's Act of 1915, 38 Stat. 1165, as further amended by § 31 of the Act of June 5, 1920, 41 Stat. 1066. *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920), held that § 4 of the Seamen's Act was applicable to foreign seamen despite contrary stipulations in the shipping articles and sustained the constitutionality of the statute as so applied. Although it might have been argued [illegible] the decrees were [illegible] to the [illegible] payment at each port directed by § 597 and not also to the incorporation by reference of the standards of § 596 as to wages and penalty wages, the contrary was determined in *The Southern*, 17 F. 2d 723, 729; 27 F. 2d 1 (C.C.A. 2d), *cert. denied*, 278 U.S. 648 (1931), and the view there taken has been followed in *Glandis v. Collinos*, 130 F. 2d 111 (C.C.A. 9th, 1941); *Lascaris v. United Greek Shipowners Corp.*, 168 F. 2d 681 (2d Cir. 1948); *Rizzamatis v. United Greek Shipowners Corp.*, 179 F. 2d 310 (1st Cir. 1949); *The Flitcroft v. Lewis*, 206 F. 2d 267 (4th Cir.), *cert. denied*, 346 U.S. 867 (1953), and other cases. Admittedly §§ 596 and 597 apply only to "wages." However, we find no persuasiveness in respondent's argument that payments for overtime are not "wages"; they seem to us as fully as much as the war bonuses that were held to be in *Glandis v. Collinos*, *supra*, and in *Lascaris v. Sofianos*, 116 F. 2d 110 (1st Cir. 1940), *cert. denied*, 313 U.S. 597. Likewise, claims for overtime pay under Italian law and for the penalty wages provided in 46 U.S.C. § 596 seem to us within the foreign wages provisions of § 597.

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The question whether the district court may decline to exercise jurisdiction in such a case has provoked a difference of opinion between courts of appeals. In *The Estrella*, 102 F.2d 736 (3d Cir. 1939), *cert. denied*, 306 U.S. 658 (1939), the Third Circuit held it may, Biggs, C.J., dissenting; in *Lakos v. Saliaris*, *supra*, the Fourth Circuit held it may not. We agree with the Fourth Circuit and with the dissenting opinion in the Third.[2]

"If the provision ... had said only that the section shall apply to seamen on foreign vessels while in harbors of the United States," it could well be contended that the claim thereby created was subject to the usual right of the admiralty to dismiss a suit between foreigners on the ground of inconvenient forum, see *The Belgenland*, 114 U.S. 355, 368 (1885); *Lynch v. Crowder*, 15 Fed. Cas. 1172 (No. 8637) (S.D.N.Y. 1849). However, Congress went further and directed that "the courts of the United States shall be open to such seamen for its enforcement." It was unnecessary to add this simply to give the federal courts jurisdiction which they might or might not choose to exercise. For it had been settled from the earliest days that the constitutional and statutory grant of "all civil causes of admiralty and maritime jurisdiction" covered controversies between foreign seamen and their vessels or masters, *Moran v. Baudin*, 17 Fed. Cas. 721 (No. 9785) (D. Pa. 1788); *Weiberg v. The St. Oloff*, 29 Fed. Cas. 591 (No. 17,357) (D. Pa. 1790); *Thompson v. The Catharina*, 23 Fed.

[2] [illegible]

Opinion of the United States District Court Dismissing the Libel and Denying Respondent's Cross Motion for Leave to File an Amended Libel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 189-325.

JOHN MONTEIRO,

Libelant,

against

SOCIEDAD MARITIMA SAN MIGUEL, S. A. and the S.S. BUENAVENTURA, her engines, tackle, boilers and appurtenances, etc.,

Respondents.

OPINION

Messrs. Burlingham & Severance, Esqs.,
Proctors for Libelant,
Charles Sullivan, Esq., of Counsel.

Messrs. Haight & Smith, Esqs.,
Proctors for Respondents,
Harold P. Morrison, Esq., of Counsel.

Messrs. [illegible]

In this libel in Portuguese [illegible]

a Liberian flag vessel owned by respondent, a Panamanian corporation. A second cause of action herein seeks recovery under Title 46 U. S. C. A. 596, 597, of a penalty of two days' pay for each day that such pay was wrongfully withheld.

Respondent has filed exceptions to the libel on the grounds that Panamanian law is not applicable to a vessel registered under the laws of Liberia and flying the Liberian flag and that libelant was serving aboard this vessel under articles of agreement of the merchant marine of the Republic of Liberia, and that by reason of the premises the libel fails to state facts sufficient to constitute a cause of action. In support of its position respondent cites a number of cases decided by this court which in effect reaffirm the long settled general rule that the law of the flag of the ship governs the internal economy of the ship, especially with regard to the wages of the crew, and further hold that merely because it is owned by a Panamanian corporation does not make Panamanian law applicable to a ship of foreign registry, particularly where that law is not by its terms so applicable. *Kyrogiannis v. National Hellenic Am. Nav. Co.*, D. C., 162 F. Supp. 520, S. D. N. Y., 1958; *Gonzalez v. Panama Canal Commission*, 150 F. Supp. 705, S. D. N. Y., 1957; *Wiegand v. Compagnie de Navigation*, 141 F. Supp. 166, S. D. N. Y., 1956. We are with respondent and sustain its exceptions.

Libelant's proofs, the opposing of the foregoing position but seeks by presentation here to file an

Opinion of the United States District Court Dismissing the Libel and Denying Respondent's Cross-Motion for Leave to File an Amended Libel

"Panamanian law which is relied upon and also to set forth a cause of action under the Liberian law in the alternative."

The proposed amended libel sets forth as its first cause of action the identical claim under Panamanian law as to which exceptions were hereinabove sustained, with the exception of the additional allegations in paragraphs sixth, seventh and eighth. These are conclusory allegations based upon information and belief that Panamanian law is applicable to and binds Panamanian corporations operating merchant vessels regardless of where the vessels are operated or the corporation is doing business, and that by incorporating in Panama the corporation agrees to be bound by all the laws of Panama that are applicable. We fail to see where these allegations measure up to what was promised in the cross-moving papers by libelant to "more fully set forth the Panamanian law which is relied upon," and consider them no more than a restatement in effect of the unsupported argument that Panamanian law is applicable to ships of foreign registry. Libelant insists that these conclusory allegations must be deemed admitted for the purpose of testing respondent's "exceptions" thereto and in that light the libel states a good and sufficient cause of action. There is no substance to such argument simply because no exceptions have been made to the proposed amended libel. Leave to file the amended libel has not been granted and [illegible] the exercise of the court's discretion, for which the

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The second cause of action set forth in the alternative in the proposed amended libel in substance is identical to the first except that the claim is based upon Liberian law similar to the Panamanian law relied upon in the first. The third cause of action, as in the original libel, is based upon §§ 596, 597 of Title 46, and depends in necessary part for its success upon libelant succeeding in establishing his claim under one of the other causes of action. These first two primary claims are bottomed, not on any alleged wages due libelant in accordance with the articles he signed and agreed to (for he has signed a statement that he has received all the monies and wages due him from the vessel under these articles), but rather on the provisions of foreign statutes similar to our own minimum wage laws or Fair Labor Standards Acts, and as such are not in their nature of admiralty cognizance. Merely because these foreign statutes are applicable to seamen (as well as to virtually every other calling or type of employee) cannot be said to qualify claims based thereon as maritime claims and thereby within the admiralty jurisdiction of the district court. As a suit by one alien against another based upon a foreign statute, in the absence of diversity of citizenship, it has [illegible] upon the [illegible] the [illegible] court and jurisdiction should be declined. The decision, with regard to the claim based on Liberian law, [illegible] has [illegible] of the New York General Corporation [illegible]

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Opinion of the District Court Denying Respondent's Motion for the Libel and Dismissing Petitioner's Cross-Motion for Leave to File an Amended Libel

In accordance with the Court's practice as provided in the *Case Against the United States of America and The Republic of Liberia*, 14 Statutes at Large 1751, it is apparent therefrom that the libelant is not without an appropriate remedy and in the absence of any claim of hardship it does not seem necessary in these circumstances to add to the burden of this court's calendar a claim which may properly be pursued under the Liberian law before the Liberian courts. Jurisdiction is accordingly declined.

Accordingly, the exceptions to the libel are sustained and the libel is dismissed without leave to plead over again. The cross-motion to file an amended libel is denied.

This is my opinion.

[illegible]

Dated, New York, N. Y., August 4, 1950.

Relevant Treaty and Statutes

Relevant Treaty and Statutes

time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner herein required without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the courts; but this section shall not apply to the case of owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts.

46 U. S. C. 597

Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or unload cargo before the voyage is ended, and all stipulations in the contrary shall be void: Provided, Such a demand shall not be made before the expiration of, nor oftener than once in five days from the time of the vessel's leaving the port where the seaman was last paid off. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to be paid the balance of his wages which shall be then due